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OCTOBER TERM, 1898.

Brf. of Davidge & Davidge for P.

Filed Jan. 19, 1899.

THE KEOKUK AND HAMILTON BRIDGE COMPANY,
PLAINTIFF IN ERROR,

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

No. 175.

BRIEF OF PLAINTIFF IN ERROR.

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Attorneys for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error is a consolidated corporation formed by the consolidation of a corporation in Iowa with one in Illinois, owning and operating a bridge across the Mississippi river between Keokuk in Iowa and Hamilton in Illinois, and having its main office at Keokuk (R. 1, 2, 3, 17, 175, 176).

The bridge was used entirely for commerce between the States of Iowa and Illinois, two railroads, wagons, and passengers crossing from State to State (R. 82, 84, 85, 99, 106, 136, 137).

The authority to construct and maintain it and to take compensation was given to the two corporations by act of Congress, 25th July, 1866.

14 Stat. 244–6.

On the 2d of May, 1895, the collector of taxes for the county in Illinois where the town of Hamilton is situated moved for judgment against certain delinquent tax-payers, the plaintiff in error among them. The tax was on the tangible property of the company, consisting in part, as described, of "a strip of land eighty feet wide, more or less, the center line of said strip of land commencing at a point in the center of Railroad avenue, in the plat of ground known as the Keokuk and Hamilton Ferry and Manufacturing Company's addition to the city of Hamilton, in said county, 707¾ feet south 72 degrees and 40 minutes east of the center of the east end of said bridge, thence running north 72 degrees 40 minutes west to the east end of said bridge; thence continuing the same course along the center line of said bridge 1,765 *feet to the State line* between the State of Illinois and Iowa, including the slopes, walls, embankments, abutments, piers, and bridge structure and improvements thereon," assessed at $79,900, and also on the capital stock, assessed at $30,080 (R. 1, 2, 21, 22, 24).

The assessment of the capital stock, $30,080, was arrived at by taking the estimated value of the capital stock and subtracting therefrom the value of the tangible property assessed in Illinois (R. 147).

The tax on the above-mentioned tangible property was $2,708.61, and on the capital stock $1,019.17 (R. 25.)

The tangible property—that is, the bridge—was assessed at more than its value, and other real property in the same county was assessed at from one-fourth to one-third of its value (R. 58, 61–71, 9–17).

The bridge company objected to the rendition of judgment upon the ground that the bridge was assessed at largely more than its fair cash value; that over six hundred feet of the bridge was located in Iowa and not subject to taxation in Illinois (R. 2, 3, 4), and furthermore that the tax upon the capital stock was, in effect, a tax upon interstate commerce; that it was levied upon the whole capital stock when only a part, if any, was assessable in Illinois, and that the assessment was not made in accordance with the rules of the State board of equalization (R. 21, 22, 140–146).

The court, however, entered judgment for the full amount claimed, from which judgment an appeal was taken to the Supreme Court of Illinois, and the latter court having affirmed the judgment, a writ of error was sued out and the case brought here (R. 193, 194, 195, 199, 202, 204, 206).

Assignment of Errors.

There was error:

1. In holding that the State of Illinois could tax the plaintiff in error's bridge to the steamboat channel rather than to the middle of the main navigable channel as recognized by the treaties, acts of Congress, and decisions of this court.

2. In sustaining the tax which was illegal because it was admittedly unequal.

3. In sustaining the tax on the bridge which was illegal because some of the bridge assessed was beyond the jurisdiction of the State of Illinois.

4. In holding that the State of Illinois could tax the capital stock of the plaintiff in error, the tax being a tax on interstate commerce.

5. In holding that the State of Illinois could tax the entire capital stock of the plaintiff in error, said plaintiff being a consolidated corporation formed by the consolidation of a corporation of Iowa and one of Illinois, and having its principal office at Keokuk, in the State of Iowa.

6. In sustaining the tax on the capital stock based upon an assessment which was arrived at by taking the value of the entire capital stock and deducting therefrom the value of the part of the bridge in Illinois.

7. In sustaining the tax of the franchise to construct and maintain the bridge and fix the compensation for the use thereof granted by the Federal Government.

Points.

I.

Part of the bridge as taxed by Illinois was in Iowa.

In order to determine whether the State of Illinois has taxed property beyond her limits and within the limits of the State of Iowa, it becomes necessary to ascertain the boundary line between the two States.

The defendant in error claims that the boundary is not in the middle of the main navigable channel of the Mississippi river, but in the middle of the steamboat channel which is at or near the draw-span of the bridge and near the Iowa shore.

On the other hand, the plaintiff in error contends that the line separating the jurisdiction of the two States is at the middle of the navigable channel of the river.

By the treaty of peace concluded in 1763 by Great Britain, France, and Spain, the boundary between the English and French territories was fixed as "a line drawn

along the middle of the river Mississippi from its source to the river Iberville," in Louisiana.

Subsequently by the treaty of Paris in 1783, Great Britain ceded to the United States all possessions east of a "line drawn along the middle of the Mississippi river."

Jenkenson's Collection of Treaties, p. 410.

And still later, in 1803, France ceded to the United States all her territory west of said line.

8. Stat. 208.

The act of Congress enabling the people of Illinois to form a State constitution defines the boundaries of the State as follows: Starting in the middle of Lake Michigan, at north latitude forty-two degrees and thirty minutes, "thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river."

3 Stat. 428.

And the subsequent constitutions of Illinois, of 1818, 1848, and 1870, defined the western boundary in the same way. Ill. Rev. Stat., 1893, Hurd.

The enabling act of Missouri made the eastern boundary of that State the same line.

3 Stat. 545.

The courts of the States bordering on the Mississippi have frequently passed on this question and have fixed the boundary at the middle of the river.

Dunlieth & Dubuque Bridge Co. *v.* County of Dubuque, 55 Iowa, 558.

Morgan *v.* Reading, 3 Sm. & Mar. (Miss.) 366.

And this court has held the same.

Missouri *v.* Kentucky, 11 Wall. 395.
Miss. & Mo. R.R. Co. *v.* Ward, 2 Black, 485.
St. Louis *v.* Rutz, 138 U. S. 226.
Jones *v.* Soulard, 21 How. 41.
The Schools *v.* Risley, 10 Wall. 91.

And the decisions of Illinois are to the same effect.

Middleton *v.* Pritchard, 3 Scammon, 510.
Brooklyn *v.* Smith, 104 Ill. 429.
Trustees of Schools *v.* Schroll, 120 Ill. 509.

And these were followed by the case of Buttenuth *v.* St. Louis Bridge Co., in which the Supreme Court of Illinois, while admitting the general doctrine as above stated, sought to define the middle of the channel or the middle of the river as "the space within which ships can and usually do pass."

Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535.

The Supreme Court of Iowa had held that not the channel but the middle of the bed of the river was the true boundary.

Dunlieth & Dubuque Bridge Co. *v.* Dubuque, 55 Iowa, 558.

And in 1891, in order that the boundary between the two States might be settled, the State of Iowa filed a bill against the State of Illinois in this court, to which the latter filed a cross-bill and this court, 3d January, 1893, decreed that the boundary line was "the middle of the main navigable channel of the Mississippi river," and appointed a commission of three competent persons, named by the court upon the suggestion of counsel, to ascertain and designate the boundary line at the nine bridges that were across the

river, one of which was the bridge of the plaintiff in error, and report to this court (R. 147, 167).

The record in that case was offered in evidence in the present case and will be found at pages 147–175 of this record. The case is reported in 147 U. S. 1.

On the 7th of March, on the request and stipulation of the attorneys-general of the two States, the courts appointed as commissioners Montgomery Meigs, a United States civil engineer; John R. Carpenter, a United States inspector, who had been employed in the neighborhood for twenty-five years and most of that time on the Des Moines Rapids canal, by which boats went to Keokuk at low water; and Albert Wempner, a licensed pilot of over forty years standing. The court at the same time ordered the commissioners to proceed at once to ascertain and mark the boundary line between said States at the Keokuk and Hamilton bridge. The commissioners then took the required oath faithfully to perform the duties of the office (R. 167, 168, 169, 131, 127, 128, 134).

On the 30th of March, 1893, the report of the commissioners was filed. The report stated that—

"after qualifying under oath, as by law provided, and after most careful consideration of the decision of your honorable body in the case above mentioned, your commissioners proceeded, as directed by you, to survey and fix the boundary line between Iowa and Illinois on the Keokuk and Hamilton bridge at Keokuk, Iowa.

"Your commissioners find that the said boundary line is situated (1,041.65) ten hundred and forty-one and sixty-five one-hundredths feet easterly of the center of the draw-span, measured along the axis of the bridge and crossing the structure in a direction parallel to the piers of the bridge.

"Your commissioners also respectfully submit the accompanying plat showing their measurements along the

bridge and to neighboring monuments as a matter of further record" (R. 171).

On the 10th of April, 1893, the report was confirmed.

Afterwards, 4th January, 1894, on motion of the State of Illinois the order confirming the report was, on account of some irregularity of the notice, stricken out and since then no steps have been taken. The report is still before the court awaiting confirmation (R. 172–175).

The commissioners were examined in the trial of the case at bar and they testified how they proceeded to locate the center of the navigable channel.

The bed of the river at this point is flat rock (R. 108, 112, 115, 128, 131, 132, 134). They took the water at an ordinary stage and in the middle of the main navigable channel they placed the mark upon the bridge (R. 129, 130, 133, 134, 136). As Meigs testified:

"We first inspected the river in the vicinity of the bridge on both shores; we consulted all the maps and references available, and, as we found, we were obliged to place the boundary in the middle; this implied that the channel should have two boundaries, equal distance from the line we were to locate. In considering this question we took into account the general navigability of the river; we consulted the records, which had been kept for years at Keokuk, of the stages of the water above low water, and we first fixed upon an average stage. This we found, from about twenty years' observation, to be six feet and one-tenth above low water. We fixed the line on the west side where this met the river bed before it was disturbed by construction, and we did the same on the east side. We found that a line ten hundred and forty-one feet easterly from the centre of the pivot pier was half way between these points, and we marked that as the boundary.

"If you had marked the middle of the river, measuring

from shore to shore, would the boundary line have been east or west of the point you marked as the middle of the main channel?

"If we had measured from the natural banks and located the boundary line half way between, it would have been somewhat east of its present position." (R. 133–134.)

And to like effect was the testimony of Wempner:

"We proceeded to find an average stage of water, between which points we found the main navigable channel of the river, and, measuring, found the eastern boundary of the channel thus defined to the westerly boundary of the channel thus defined, divided the distance in the middle, and marked the same upon the bridge at Keokuk ten hundred and forty-one and sixty-five hundredths feet east of the draw pier of said bridge.

"How much of the main channel that you have described would be navigable at an ordinary state of water if all artificial obstructions were removed?

"All of it." (R. 136.)

One would think that the testimony of these three experts to whom the States had agreed to entrust the fixing of the boundary between the States under the decision of this court would have been sufficient. The defendant in error, however, taking advantage of the fact that the order confirming the report of the commissioners had been stricken out, and that the report was still unconfirmed, offered a good deal of evidence to prove that the channel of the river was at or just east of the draw-span of the bridge. The most casual perusal of the record will show, however, that these witnesses, mostly steamboat pilots, testified as to the existence of a channel on the Iowa side of the river, and that they were not endeavoring to fix the main navigable channel as defined by this court. These witnesses testified as to where the steamboats ran up and

down the river. But there is no doubt as to this fact. Steamboats ran on the Iowa side and also (before the artificial obstructions were built) on the Illinois side (112, 113, 116, 132). And in the middle (R. 111, 112, 114). Indeed ferries ran across between Keokuk and Hamilton (R. 108, 109, 110, 112, 113).

None of these witnesses, however, had taken any regular soundings, or knew the bed of the river (R. 37, 41, 47, 49, 51, 54, 56). What they knew was that the channel followed by steamboats was on the Iowa side. Indeed it is on that side that the draw-span is built. But this is fully explained by the commissioners and other witnesses. Steamboats took the western side of the river to get into the canal that had been built on the Iowa side, and it was to enable boats to do this that the draw-span was built on that side (R. 111, 128, 130, 131, 133).

II.

Part of the bridge assessed by Illinois being beyond her jurisdiction, and the tax therefore illegally imposed, the whole tax is vitiated.

Santa Clara County *v.* South. Pac. R.R., 118 U. S. 394, 416.

Phila. Fire Assn. *v.* New York, 119 U. S. 110.

III.

The tax on the bridge was illegal because not equally assessed.

The other property in the county was assessed at one-third to one-fifth its real value. This is proven by the assessors themselves (R., 58, 61–71, 9–17). The bridge

was assessed at $79,900—that is 1565 feet, but the evidence of engineers and bridge-builders shows that that part of the bridge, including the Illinois approach, was only worth about $70,300, and that a new structure at that time would only have been worth $96,000. The life of a bridge of this description is about fifty years, and this bridge was finished in 1871 (R., 83, 90, 99, 105).

California *v.* Cent. Pac. R.R. Co., 127 U. S. 1.

IV.

The Tax Upon the Capital Stock of the Plaintiff in Error is Unconstitutional and Void.

1. By the law of Illinois it is provided that "the capital stock of all companies and associations now or hereafter created under the laws of this State shall be so valued by the State board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association."

Act of March 30, 1872.

State Railroad Tax Cases, 92 U. S. 603.

A tax upon the valuation of the capital stock of a corporation is necessarily a tax upon its property and assets, including its franchises, and especially its business. Perhaps the most important element in such valuation is the business and profits resulting therefrom.

Gloucester Ferry Co. *v.* Penn., 114 U. S. 196.

Bank Tax Cases, 2 Wall. 200.

State Railroad Tax Cases, 92 U. S. 575.

Pullman's Palace Car Co. *v.* Central Trans. Co., 171 U. S. 138.

Com. *v.* Standard Oil Co., 101 Pa. St. 119, 145.

In the present case it is apparent, as matter of fact, that the assessed value of the capital stock was based exclusively upon the business carried on. The shares were worthless, there was no personal property, and nothing remained but the business (R. 138, 139).

It is submitted that the business thus taxed was interstate commerce. If so, it is evident that it was beyond the taxing power of the State. Such a business is not carried on by the permission of the State, and is not subject to its regulation or control. The State cannot enact a license to carry it on,[1] nor can it tax the subjects of such business,[2] nor the instruments whereby it is carried on,[3] nor the gross outcome[4] of it, nor "retard, impede, burden, or in any manner control" its prosecution.

McCulloch *v.* Maryland, 4 Wheat. 316, 436.

[1] Moran *v.* New Orleans, 112 U. S. 69.

[1] Leloup *v.* Port of Mobile, 127 U. S. 640.

[2] Brown *v.* Maryland, 12 Wheat. 419.

[3] Gloucester Ferry Co. *v.* Penn., 114 U. S. 196.

[3] Covington Bridge Co. *v.* Kentucky, 154 U. S. 204.

[4] Phila. Steamship Co. *v.* Penn., 122 U. S. 326.

What is the business of the plaintiff in error? It is a consolidated corporation consisting of two companies, one incorporated by the State of Iowa and the other by the State of Illinois, and empowered by act of Congress to construct and maintain a bridge over the Mississippi, a navigable river, and to receive tolls for the transportation of persons and property from one shore to the other. In pursuance of such power it built the bridge in 1871, and has since been engaged in the business of transportation. The question presented to this court is whether, being engaged in such business, the bridge company is as to its business subject to taxation by the State of

Illinois. That it is not is settled by the adjudications of this court.

Gloucester Ferry Co. *v.* Penn., 114 U. S. 196, was the case of a corporation incorporated by the State of New Jersey and authorized to transport across the Delaware river persons and property to Philadelphia, in the State of Pennsylvania, by means of ferry-boats.

The State of Pennsylvania, in which the corporation had no property subject to taxation by it, imposed a tax upon the capital stock of the company, which necessarily fell upon the ferry-boats and business. This court held that the business carried on was interstate commerce, and the boats instruments for carrying on such business and hence the tax was unconstitutional and void.

In Covington Bridge Co. *v.* Kentucky, 154 U. S. 204, there was a bridge over the Ohio river between Cincinnati, Ohio, and Covington, Kentucky, used, as here, for the transportation of persons and property from shore to shore. The State of Kentucky passed a law fixing the rate of toll to be charged by the owner of the bridge for transportation. This court held the law was unconstitutional and void because the business carried on was interstate and the bridge was an instrument of interstate commerce. Mr. Justice Brown, delivering the opinion of the court, said:

"With reference to the *second* question, an attempt is made to distinguish a bridge from a ferry-boat, and to argue that while the latter is an instrument of interstate commerce the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge

may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

The above cases would appear to determine the one now under consideration.

2. It may be said that the tax is not specifically upon the business carried on but generally upon the valuation of the capital stock. The answer is plain. The valuation of such stock necessarily includes the business, and, indeed, the latter is the chief element entering into such valuation.

The settled doctrine of this court is that when the tax is entire and laid on different elements of property as a unit, if any one of the elements is illegally taxed the whole tax is bad.

In Santa Clara County *v.* South. Pac. R.R. Co., this court, Mr. Justice Harlan delivering the opinion, said:

"The case as presented to the court below was, therefore, one in which the plaintiff sought judgment for the entire tax arising upon assessment of different kinds of property as a unit—such assessment including property not legally assessable by the State board, and the part of the tax assessed against the latter property not being separable from the other part. Upon such an issue the law, we think, is for the defendant; an assessment of that kind is invalid and will not support an action for the recovery of the entire tax so levied. Cooley on Tax-

ation, 295–6, and authorities there cited; Libby *v.* Burnham, 15 Mass. 144, 147; State, Randolph, &c., *v.* City of Plainfield, 38 N. J. Law (9 Vroom) 93; Gamble *v.* Witty, 55 Mississippi, 26, 35; Stone *v.* Bean, 15 Gray, 42, 45; Moshier *v.* Robie, 11 Maine (2 Fairfield), 137; Johnson *v.* Colburn, 36 Vt. 695; Wills *v.* Burbank, 17 N. H. 393, 412."

Santa Clara County *v.* South. Pac. R.R. Co., 118 U. S. 394, 416.

In California *v.* Pacific R.R. Co., Mr. Justice Bradley, delivering the opinion of the court, says:

"The last section shows explicitly that, in regard to a railroad, the State board has power to assess only five things, the franchise, roadway, road-bed, rails, and rolling-stock; the county boards are authorized to assess all the rest of the property. If the State board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be *pro tanto* illegal and void. If the unlawful part can be separated from that which is lawful, the former may be declared void, and the latter may stand; but if the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal. This is so well settled that it needs no citation of authorities farther than to refer to the opinion of this court in the former cases (118 U. S.) In the present assessments, all parts of the property are blended together and are inseparable. If it be true, therefore, that property not authorized to be included in the assessments is included therein, the assessments must be declared void."

California *v.* Pac. R.R. Co., 127 U. S. 129.

In Gloucester Ferry Co. *v.* Pennsylvania, *supra*, the tax was assessed generally upon the capital stock.

The evidence leaves no doubt that the valuation of the capital stock in fact included the business carried on.

3. It may further be objected that the business was not interstate because the plaintiff in error did not itself transport persons and property from shore to shore but only supplied a bridge whereby such transportation was made by those who used it. Of course, it is not denied that a party engaged in the business of supplying an instrument afterwards used in interstate business, as a ship or railway, can not be said to be engaged in such business. He merely supplies an instrument by sale or hire which another embarks in interstate business. Such instrument or its use has become the property of the vendee or hiree, and the fact that he, as owner, uses it in interstate business cannot make the vendor or hirer a party engaged in such business. And so it would be if the instrument were sold or hired for the express purpose of being so used. In neither case does the vendor or hirer become a participant in the interstate business.

The above illustrations and others that might be put lose sight of the essential fact that in the present case the vendor or hirer of the instrument and those who use it are engaged in a common object, which is simply to get the persons or property from one shore to the other, or, in other words, transportation ; to accomplish this both contribute. The owner of the bridge supplies a firm foundation where without the bridge there would be water, and the wayfarer supplies his legs, and the carrier of merchandise, vehicles and motive power. But the legs of the wayfarer would never alone carry him across, nor would the vehicle of the carrier land the merchandise on the farther shore. The case is simply where the contributions of several actors unite in the accomplishment of a common object. It is true *it* is passive ; it does not supply in a certain sense ; it does not move the body of the wayfarer nor the vehicle of the carrier ; but it does more : it supplies the

means whereby the above forces can be exerted, and it continues such supply in the whole passage from one end of the bridge to the other. All the way it is co-operating with those forces until the common object is attained; that is, until the opposite shore is reached. It had as well be said that in the mechanical process of lifting an object the work is not done in any degree by the fulcrum but only by the lever. It avails nothing to say that the interstate business is done by passengers and carriers of merchandise. That may be and probably is so, but it does not follow that such business is not also done by the participation of the other agent, the bridge, without which participation the business could not be done. Every contract made by the bridge company, express or implied by law, is a continuing contract, made in one State and to be performed partly in it and partly in another State. The contract and the legal liability are always to land safely on the other shore. A remarkable feature of the present case is that the manifest purpose of the construction of the bridge was interstate commerce as defined by Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheat. 190-194, and that in the nature of things it is used, and can be used solely, for that object. It is not always that an alleged instrument of commerce is necessarily bound up with such commerce and has no faculties beyond. A ship may or may not be an instrument of commerce, depending on its use in interstate or foreign commerce, but this bridge from its locality must be such instrument and nothing else. It may be said it is not a carrier in the technical sense of that term. Even assuming this, it is none the less embraced within the constitutional provisions.

It is noticeable that the present case is not that of a turnpike or other way, the use of which may be turned

over to another without further responsibility than to keep it fit for traffic. On the contrary, as the evidence shows, there is a draw on the Iowa side involving, of necessity, important services on the part of the company in the transportation of passengers and freights as well as in assisting in the navigation of the river by vessels.

The case of Henderson Bridge Company *v.* Kentucky, 166 U. S. 150, will probably be relied on in behalf of the defendant in error, but that case was distinguished by the court from Covington Bridge Company *v.* Kentucky, 154 U. S. 204, and the latter case, holding a bridge to be an instrument of commerce, was not overruled. What is carrying on the business of transportation between State and State is a matter of fact, and in the former case it was found by this court as a fact that the Henderson Bridge Company did not itself carry on such business, but merely hired the use of its bridge to parties who used it for that purpose. In the present case the Bridge Company was itself engaged in the business of transporting persons and property from shore to shore, and that surely is interstate commerce.

In the Henderson Bridge Company's case the acts of Congress referred to conferred no right or franchise on the company to erect the bridge or collect tolls for its use. They merely regulated the height of bridges over that river (the Ohio) and the width of their spans in order that they might not interfere with its navigation. (See opinion, p. 154.)

Far different is the present case, for the act of Congress expressly confers the right or franchise to build the bridge, and to charge a reasonable compensation by way of toll. See act, sec. 1. It thus appears that Congress has made such regulation of commerce as it deemed right, and by

that regulation the owner of the bridge is empowered to fix the compensation, subject only to the restriction that it shall be reasonable. It is not competent for the State of Illinois to add to such regulation and impose by way of tax a greater burden than that provided by Congress.

Covington and Cincinnati Bridge Co. *v.* Kentucky, *supra*.

V.

The tax on the capital stock denies to the plaintiff in error the equal protection of the laws.

The tax is upon extra-territorial real estate that is the part of the bridge confessedly in the State of Iowa. It also embraces the franchise granted by that State as well as the franchise granted by the act of Congress.

The two corporations derived the franchise to construct and maintain the bridge and charge reasonable compensation from the Federal Government. A State cannot tax such a franchise although it may tax the property of a Federal corporation.

California *v.* Central Pac. R.R. Co., 127 U. S. 1, 40, 41.

Tel. Co. *v.* Texas, 105 U. S. 460.

Santa Clara County *v.* South Pac. R.R. Co., 118 U. S. 394.

Respectfully submitted, W. D. Davidge & W. D. Davidge
~~DAVIDGE & DAVIDGE,~~

Attorneys for Plaintiff in Error.

APPENDIX.

CHAP. CCXLVI. *An Act to authorize the Construction of Certain Bridges, and to establish them as Post Roads.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches.

SEC. 2. *And be it further enacted*, That any bridge built under the provisions of this act may, at the option of the company building the same, be built as a draw-bridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in

any case than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river and not less than three hundred feet in length: *And provided also*, That if any bridge built under this act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river: *And provided also*, That said draw shall be opened promptly upon reasonable signal for the passage of boats whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains.

SEC. 3. *And be it further enacted*, That any bridge constructed under this act and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post route; upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their trans-

portation over the railroads or public highways leading to the said bridge.

SEC. 4. *And be it further enacted*, That it shall be lawful for the Chicago, Burlington and Quincy Railroad Company, a corporation whose road has been completed to the Mississippi river, and connects with a railroad on the opposite side thereof, having first obtained authority therefor from the States of Illinois and Iowa, to construct a railroad bridge across said river, upon the same terms, in the same manner, under the same restrictions, and with the same privileges, as is provided for in this act in relation to the bridge at Quincy, Illinois.

SEC. 5. *And be it further enacted*, That a bridge may be constructed at the town of Hannibal, in the State of Missouri, across the Mississippi river, so as to connect the Hannibal and Saint Joseph Railroad with the Pike County and Great Western Railroads of Illinois, on the same terms and subject to the same restrictions as contained in this act for the construction of the bridge at Quincy, Illinois.

SEC. 6. *And be it further enacted*, That a bridge may be constructed across the Mississippi river between Prairie du Chien, in the State of Wisconsin, and North McGregor, in the State of Iowa, with the consent of the legislatures of Wisconsin and Iowa, on the same terms and subject to the same restrictions as are contained in this act for the construction of the bridge at Quincy, Illinois.

SEC. 7. *And be it further enacted*, That the Keokuk and Hamilton, Mississippi, Bridge Company, a corporation existing under the laws of the State of Iowa, and the Hancock County Bridge Company, a corporation existing under the laws of the State of Illinois, be and are hereby authorized to construct and maintain a bridge over the Mississippi river between Keokuk, Iowa, and Hamilton, Illi-

nois, of the same character, description, and construction as provided in this act for the bridges at Quincy and Burlington; and the said bridge, in its use and operation, shall be subject to the same restrictions that apply to said bridges at Quincy and Burlington by the terms of this act.

SEC. 8. *And be it further enacted*, That the Winona and Saint Peter Railroad Company, a corporation existing under the laws of the State of Minnesota, is hereby authorized to construct and operate a railroad bridge across the Mississippi river between the city of Winona, in the State of Minnesota, and the opposite bank of the said river, in the State of Wisconsin, with the consent of the legislatures of the States of Minnesota and Wisconsin; and said bridge by this section authorized is hereby declared a post route, and subject to all the terms, restrictions, and requirements contained in the foregoing sections of this act.

SEC. 9. *And be it further enacted*, That a bridge may be constructed and maintained across the Mississippi river, between Dunleith, in the State of Illinois, and Dubuque, in the State of Iowa, with the consent of the said States previously given or hereafter acquired, with the same privileges, upon the same terms, and under the same restrictions as are contained in this act for the construction of a bridge at Quincy, Illinois.

SEC. 10. *And be it further enacted*, That any company authorized by the legislature of Missouri may construct a bridge across the Mississippi river, at the city of Kansas, upon the same terms and conditions provided for in this act.

SEC. 11. *And be it further enacted*, That the "Saint Louis and Illinois Bridge Company," a corporation organized under an act of the general assembly of the State of Missouri, approved February fifth, eighteen hundred and

sixty-four, and an act amendatory of the same, approved February twentieth, eighteen hundred and sixty-five, and also confirmed in its corporate powers under an act of the legislature of the State of Illinois, approved eighteen hundred and sixty-four, or any other bridge company organized under the laws of Missouri and Illinois, be, and the same is hereby, empowered to erect, maintain, and operate a bridge across the Mississippi river, between the city of Saint Louis, in the State of Missouri, and the city of East Saint Louis, in the State of Illinois, subject to all the conditions contained in said act of incorporation and amendments thereto, and not inconsistent with the following terms and provisions contained in this act. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said waters, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches.

SEC. 12. *And be it further enacted*, That the bridge authorized by the preceding section to be built shall not be a suspension bridge, or draw-bridge, with pivot or other form of draw, but shall be constructed with continuous or unbroken spans, and subject to these conditions: First, that the lowest part of the bridge or bottom chord shall not be less than fifty feet above the city directrix at its greatest span. Second, that it shall have at least one span five hundred feet in the clear, or two spans of three hundred and fifty feet in the clear of abutments. If the two latter spans be used, the one over the main steamboat channel shall be fifty feet above the city directrix, measured to the lowest part of the bridge at the centre of the span. Third, no span over the water, at low-water mark, shall be less than two hundred feet in the clear of abutments.

SEC. 13. *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

Approved July 25, 1866.

Rev. Stat. Ill. 1893, Hurd, Chap. 120, § 3.

"Fourth. The capital stock of all companies and associations now or hereafter created under the laws of this State except those required to be assessed by the local assessors, as hereinafter provided, shall be so valued by the State board of equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association; such board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as it may deem equitable and just, and such rules and principles when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject, however, to such change, alteration, or amendment as may be found from time to time to be necessary by said board: *Provided*, That in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of such company or association shall not be assessed or taxed in this State. This clause shall not apply to the capital stock, or shares of capital stock of banks organized under the general banking laws of the State, or under any special charter heretofore granted by the legislature of this State: *Provided further*, That companies and associations organized for purely manufacturing purposes, or for the mining and sale of coal, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed."

§ 8.

"The State board of equalization shall assess the capital stock of each company or association, respectively, now or hereafter incorporated under the laws of this State, in the manner hereinbefore in this act provided. The respective assessments so made (other than of the capital stock of railroad and telegraph companies) shall be certified by the auditor, under direction of said board, to the county clerk of the respective counties in which such companies or associations are located, and said clerk shall extend the taxes for all purposes on the respective amounts so certified the same as may be levied on the other property in such towns, districts, villages or cities in which such companies or associations are located."